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NO. 375

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, Appellant,

vs.

THE TIMES-PICAYUNE PUBLISHING COMPANY, L. K. NICHOLAS and JOSEPH P. GUICHET, JR., et al.

Appeal from the United States District Court for the Eastern District of Louisiana

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STATEMENT AS TO JURISDICTION

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FILED AUGUST 29, 1952

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Civil Action No. 2797

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE TIMES-PICAYUNE PUBLISHING COMPANY, L. K. NICHOLSON, JOHN F. TIMS, JR., AUBREY F. MURRAY AND DONALD W. COLEMAN,

Defendants.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on July 1, 1952. A petition

for appeal is presented to the district court herewith, to wit, on August 27, 1952.

OPINION BELOW

The opinion of the district court for the Eastern District of Louisiana, New Orleans Division, is unreported. A copy of the opinion, findings of fact, conclusions of law, and final judgment were attached to the Statement As To Jurisdiction filed by the defendants with this Court in their petition for appeal.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *United States Gypsum Co.*, 333 U.S. 364.

Associated Press, Inc. v. *United States*, 326 U.S. 1.

Terminal Railroad Assn. v. *United States*, 266 U.S. 17.

QUESTION PRESENTED

The United States filed a complaint against a newspaper publishing company and its officers alleging violations of Sections 1 and 2 of the Sherman Act. The United States sought by way of relief injunctions against (a) forced combination advertising rates, (b) optional combination advertising rates which effect economic coercion upon advertisers to deal exclusively with the defendants, and (c) special discounts granted to advertisers in one newspaper based upon the volume of advertising carried in another newspaper published by defendants. The district court held that the defendants had violated the Sherman Act, but granted relief only against the forced combination advertising rates. This appeal presents the question whether the facts are such as to entitle the United States to changes in the court's judgment.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 2, 4) commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every

person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil action instituted by a complaint filed by the United States on June 14, 1950, under Section 4 of the Sherman Act, against (1) The Times-Picayune Publishing Company, a Louisiana corporation which publishes the Times-Picayune (morning), the New Orleans States (evening), and the Times-Picayune & States (Sunday), (2)

L. K. Nicholson, its President, (3) John F. Tims, Jr., its Vice President and General Manager, (4) Aubrey F. Murray, its Advertising Director, and (5) Donald W. Coleman, its Circulation Manager.

Insofar as is now pertinent, the complaint charged that the defendants violated Sections 1 and 2 of the Sherman Act in the following particulars: (1) by entering into contracts in restraint of trade with national (sometimes called general) and classified advertisers requiring them to contract to purchase advertisements in both the morning (Times-Picayune) and the evening (New Orleans States) newspapers as a unit at combination rates, and by refusing to sell such advertising in the morning or evening newspapers separately; and (2) by entering into contracts with local display advertisers in the Times-Picayune, giving them the privilege of paying for any advertising carried in the New Orleans States at the States' rate but based upon the volume of advertising contracted for in the Times-Picayune.

The trial of this cause commenced on April 30, 1951, and on May 26, 1952 the district court filed its opinion holding that the classified and national (or general) advertising contracts entered into by the defendant publishing company were contracts in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act, and that the defendant publishing company by entering into such contracts had attempted to monop-

olize trade and commerce in violation of Section 2 of the Act. The district court also concluded that all of the individual defendants, except the defendant Donald W. Coleman, had violated Sections 1 and 2 of the Act by forming and effectuating on behalf of the defendant publishing company the aforesaid contracts.

The Government and the defendants submitted proposed findings of fact and conclusions of law, and the Government submitted a proposed decree, a copy of which is annexed to this Statement. Sections V-C and V-D of the Government's proposed decree sought to enjoin the defendants from:

> C. Entering into, adhering to or claiming any right under any contract, agreement, or understanding for the sale of advertising space in any single newspaper where such space is not sold in combination with advertising space in any other newspaper published by the defendants or any of them, the rate for which is based upon or determined by the volume of advertising space to be purchased or purchased in any other newspaper published by the defendants or any of them.
>
> D. Entering into, adhering to or claiming any right under any contract, agreement, or understanding for the sale of advertising space in more than one newspaper published by the defendants or any of them, the combined rate for which is:

1. During a period of 3 years following the effective date of this final judgment, lower than the sum of the rates for the same amount of advertising space when purchased separately in each of the newspapers published by defendants or any of them which is included in the combined rate, or

2. After a period of 3 years following the effective date of this final judgment, lower than the sum of the rates for the same amount of advertising space when purchased separately in each of the newspapers published by the defendants or any of them which is included in the combined rate, minus such amount as the defendants or any of them can show represents savings in costs to the publisher or publishers resulting from the production and sale of such advertising in combination.

These provisions, as well as proposed relief against forced combination advertising rates, sought to dissipate the unfair competitive advantage which the defendants secured over their only newspaper competitor, to prevent the defendants from devising alternative methods for achieving the same illegal ends as those which motivated the adoption of the compulsory unit rate, and to ward

off any future abuse of the defendants' monopoly position in the morning newspaper field to injure a competitor.

On July 1, 1952 the district court entered its findings of fact, conclusions of law, and final judgment, which failed to include injunctive provisions as requested in Sections V-C and V-D of the Government's proposed judgment. The material provisions of the court's decree may be summarized as follows:

All of the defendants (except the defendant Donald W. Coleman) are adjudged to have violated Sections 1 and 2 of the Sherman Act (Sections I and IV). The defendant publishing company is enjoined from "offering to sell, contracting to sell, or selling advertising space in any newspaper published by it only upon the condition, expressed or implied, that the purchaser of such space will contract for or purchase advertising space in any other newspaper published by it" (Section V-A), and from "refusing to contract to sell or refusing to sell advertising space separately in each newspaper publishing by said defendant" (Section V-B). The defendant publishing company is also enjoined from using its "dominant position * * * in the morning field, to sell any newspaper advertising at rates lower than those approximating either (1) the cost of producing and selling such advertising or (2) comparable newspaper advertising rates in New Orleans" (Section V-C).

THE QUESTIONS ARE SUBSTANTIAL

We submit that the district court's decree fails to provide effective safeguards against continuation or removal of defendants' unlawful practices in the newspaper advertising field. Using the dominant position of the Times-Picayune in the New Orleans newspaper market, the defendants have imposed upon their advertisers contracts for advertising space which have restrained general and classified advertisers from making an untrammeled choice in the selection of those newspapers which will carry their advertising. In formulating and effectuating these advertising contracts, they have forced some advertisers to increase their support of defendants' newspapers, contrary to their wishes, and to discontinue the use of their only newspaper competitor, thus substantially diminishing the competitive vigor of the Item.

Although the decree enjoins the defendants from establishing advertising rates below cost under certain circumstances, for all practical purposes it does no more than terminate the forced combination advertising rates adopted by the defendants. The decree has failed to grant relief against (a) combination rates optional in form but which provide a strong inducement for advertisers to deal exclusively with the defendants, or (b) advertising rates in one newspaper based upon the volume of advertising space contracted for in

another newspaper. Sections V-C and V-D of the decree proposed by the plaintiff sought to enjoin these practices, which defendants may well devise as alternative methods for achieving the same illegal ends.

The usual rule that prevails in Sherman Act cases is that the judgment should be so framed that it will bar further violation of the statute not only by the means found to have been employed but also by "untraveled roads" to the same end, and that it will "effectively pry open to competition a market that has been closed by defendants' illegal restraints." *International Salt Co.* v. *United States*, 332 U.S. 392, 400-402. See also *Local 167* v. *United States*, 291 U.S. 293, 299; *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 461; *United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290, 308; *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 727. While a Court should not "impose penalties in the guise of preventing future violations," this does not mean that the judgment "need deal only with the exact type of acts found to have been committed or that the Court should not, in framing its decree, resolve all doubts in favor of the Government, or may not prohibit acts which in another setting would be unobjectionable." *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 409. See also *United States* v. *U. S. Gypsum Co.*, 340 U.S. 76, 88-89.

A prohibition solely against forced combination advertising rates overlooks the fact that an optional combination rate can be so adjusted as to amount to economic coercion upon the advertiser. The central fact upon which the district court's opinion rests is that the Times-Picayune is the dominant newspaper in New Orleans and its trading territory. In practical effect this means, as the court found, that most advertisers who use any newspaper advertising in New Orleans feel compelled to use the Times-Picayune. Hence, any optional combination rate structure which grants an arbitrarily low price concession to advertisers who contract to use both of defendants' newspapers will induce those advertisers to deal with the defendants to the exclusion of the competing newspaper, thus providing an effective means for evasion of the injunctive provisions against forced combination rates.

Section V-D of plaintiff's proposed judgment contains an absolute prohibition for a period of three years against any form of combination rate for advertising in more than one newspaper published by the defendants lower than the sum of the separate rates in the respective papers. The abolition of combination rates for a limited period of time will insure that the consequences of the unfair and illegal competitive advantage which defendants secured over the competing newspaper will be dissipated. Cf. *Morton Salt Co.* v.

Suppiger, 314 U.S. 488, 493. After three years, this provision authorizes reductions in combination rates where the defendants can show that the reduction does no more than pass on to the advertiser the savings in cost to the publisher resulting from publishing the same advertisement in combination. Thus it safeguards defendants' rights by permitting reduced combination rates where economically justified on a cost saving basis. Such a provision preserves two objectives: first, it prevents new abuses of defendants' monopoly position in the morning field by protecting against combination rates which either by their express terms or as a matter of economic inducement amount to compulsory combination rates; and second, it permits the defendants to maintain a rate structure which allows them to pass on to the advertiser such cost savings as result from a single corporation's ownership of two newspapers published in the same city.[1]

The prohibition against forced combination rates will furnish a strong incentive for the defendants to find some other means of satisfying their proven proclivity to use the leverage of the Times-Picayune to aid the New Orleans States. The district court found in connection with local

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[1] Section V-D of plaintiff's proposed decree shifts the burden of establishing cost savings on the defendants, where it properly belongs. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 148; cf. *United States* v. *U. S. Gypsum Co.*, 340 U.S. 76, 94.

display advertising that defendants offered a reduced rate to States' advertisers based upon the amount of lineage contracted for in the Times-Picayune and that the effect "was to draw some advertising from the Item to the States." We submit that what defendants have done for years in local display advertising, they may now do in national and classified advertising unless enjoined by the Court. Section V-C of plaintiff's proposed judgment prevents a rate structure in which concessions in the separate rate for one newspaper are based in any way upon the volume of advertising taken in another newspaper. For the defendants to base rates in one newspaper upon the volume of advertising taken in another is but an alternative means of achieving the objective which motivated their adoption of the forced combination rates. Unless enjoined, defendants could, with impunity, offer separate rates for each newspaper under rate schedules which would grant large reductions for advertising in one newspaper to those advertisers who agreed to use both of defendants' newspapers.

We submit that the various deficiencies in the decree to which we have referred present questions of undoubted substance, particularly in view of the fact that approximately 180 newspaper publishers throughout the country employing similar advertising contracts may be affected by the decision in this case. In many civil proceedings under the

Sherman Act, the adequacy of the relief granted is of critical and even central importance. In numerous appeals from judgments entered in such cases, the adequacy or appropriateness of the relief granted by the trial court has presented an issue of more general importance, and one which was more sharply disputed, than the question of substantive violation of the statute. *Crescent Amusement Co.* v. *United States,* 323 U.S. 173; *United States* v. *National Lead Co.,* 332 U.S. 319; *Paramount Pictures, Inc.* v. *United States,* 333 U.S. 131. The basic issue which this appeal presents is, in short, whether "the Government has won a lawsuit and lost a cause." See *International Salt* case, *supra,* at p. 401. The issue on this appeal will have its economic impact upon a very large segment of the newspaper and advertising industries.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

(Signed) ROBERT L. STERN
Acting Solicitor General

August 27, 1952.

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